88-1531

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
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NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1988

MICHAEL KINDNESS,
Petitioner

v.

DONALD J. SPANG, ROBERT A. YOHE, BETHLEHEM STEEL CORPORATION and THE UNITED STEEL WORKERS OF AMERICA, LOCAL UNION NO. 1688 OF THE UNITED STATES STEEL WORKERS OF AMERICA,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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149 pp

QUESTIONS PRESENTED

1. WHETHER RESPONDENTS, BETHLEHEM STEEL CORPORATION AND LOCAL UNION NO. 1688 OF THE UNITED STATES OF AMERICA, HAD SUFFICIENT KNOWLEDGE OF PETITIONER'S CLAIMS, ALLEGING CERTAIN ACTS PERFORMED BY ITS AGENTS IN VIOLATION OF HIS RIGHTS, INCLUDING BREACH OF DUTY OF FAIR REPRESENTATION, SUCH THAT FEDERAL RULE OF CIVIL PROCEDURE 15 IS APPLICABLE AND PETITIONER'S AMENDED COMPLAINT PROPERLY RELATES BACK TO THE DATE WHEN THE INITIAL COMPLAINT WAS FILED?

2. WHETHER PRO SE PETITIONER SHOULD BE GIVEN LATITUDE IN HIS PLEADINGS SUCH THAT RESPONDENTS, BETHLEHEM STEEL CORPORATION AND LOCAL UNION NO. 1688 OF THE UNITED STEELWORKERS OF AMERICA, MAY NOT RELY ON INCORRECT STATEMENTS OF LAW MADE BY PRO SE PETITIONER IN HIS COMPLAINT REGARDING CERTAIN ACTIVITIES, AND MAY NOT TAKE ADVANTAGE OF PRO SE PETITIONER'S LACK OF KNOWLEDGE OF TECHNICAL LEGAL REQUIREMENTS, TO INVOKE THE PROTECTIONS OF RULE 15, WHEN RESPONDENTS HAD ACTUAL KNOWLEDGE CONTRARY TO STATEMENTS MADE BY PRO SE PETITIONER AT THE TIME HIS INITIAL COMPLAINT WAS FILED?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES.....	iii
OPINIONS BELOW.....	1
JURISDICTION.....	2
STATUTE (RULE) INVOLVED.....	4
STATEMENT OF THE CASE.....	4
REASONS FOR GRANTING THE WRIT..	18
CONCLUSION.....	50
APPENDIX.....	A-1

TABLE OF AUTHORITIES

CASES:

	Page
Armstrong v. Manzo, 380 U.S. 545 (1965).....	46
Connolly v. Connolly, 316 S.2d 167 (La. App. 1975).....	45
Bloomfield Mechanical Contracting, Inc. v. Occupational Safe and Health Review Commission, 519 F.2d 1257 (3d Cir. 1975).....29,	30
Fair Housing Fund Development v. Berk, 55 F.R.D. 414 (E.D. NY 1972).....	35
Haines v. Kerner, 404 U.S. 519 (1972).....	49
Howze v. Jones and Laughlin Steel Corporation, 750 F.2d 1208 (3d Cir. 1984).....	30
Johnson v. Helicopter and Airplane Services Corporation, 389 F.Supp. 509 (D. Md. 1974).....	31
Justice v. Fabey, 541 F. Supp. 1019 (E.D. Pa. 1982)...	32
Little v. Streeter, 452 U.S. 1 (1981).....	47

TABLE OF AUTHORITIES

CASES:

	Page
Logan v. Zimmerman Brush Company, 455 U.S. 422 (1982).....	43
Pack v. South Carolina Wildlife and Marine Resources Department, 92 F.R.D. 22 (D. S.C. 1981).....	39
Reaves v. Sielaff, 382 F. Supp. 472 (E.D. Pa. 1974)....	32
Southwest Marine, Inc. v. Campbell Industries, 616 F.Supp. 253 (S.D. Cal. 1985).....	30
Summit Office Park, Inc. v. United States Steel Corporation, 639 F.2d 1278 (5th Cir. 1981).....	31

STATUTES:

National Labor Relations Act, 29 U.S.C. §160.....	2
National Labor Relations Act, §301 [29 U.S.C. §185].....14, 21, 22, 23, 24, 25, 26	

TABLE OF AUTHORITIES

STATUTES:

	Page
National Labor Relations Act, 28 U.S.C. §1254(1).....	4
National Labor Relations Act, 28 U.S.C. §1331.....	2, 4

RULES:

Federal Rule of Civil Procedure 15.....4, 17, 18, 19, 20, 29, 30, 31, 32, 37, 38, 49, 50	
Federal Rule of Civil Procedure 21	35

The Petitioner, Michael Kindness, respectfully prays that a Writ of Certiorari issued to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, entered in the above-captioned proceeding on December 19, 1988.

OPINIONS BELOW

The Opinions of the Court of Appeals for the Third Circuit are reprinted in the Appendix hereto, Page A-1, infra.

The Memorandum Decisions of the United States District Court for the Middle District of Pennsylvania (Rambo, D.J.) are

reprinted in the Appendix hereto beginning at Page A-5, infra.

JURISDICTION

Petitioner, pro se, initially filed his action in the State Court of Common Pleas of Dauphin County, Pennsylvania on October 23, 1986. On November 14, 1986, Respondents filed a Petition for Removal and removed the case to the Middle District of Pennsylvania. Petitioner's Petition to Remand was denied as the District Court held that the case involved a question of federal law under the National Labor Relations Act, 29 U.S.C. §160, et seq. and exercised its jurisdiction under 28 U.S.C. §1331. After

discovery and other pretrial matters, Respondents Bethlehem Steel and the Steel Workers Union filed Motions to Dismiss and the Union was dismissed as a party to the Complaint on October 2, 1987. Respondents Spang and Respondent Yohe subsequently filed Motions for Summary Judgment and said Motions were granted by the District Court on November 9, 1987. On June 8, 1988, the District Court granted Bethlehem Steel's Motion to Dismiss.

On Petitioner's Pro Se Appeal, the Third Circuit, by Judgment Order, affirmed the Decisions of the District Court on November 18, 1988. Petitioner, pro se, sought a rehearing and on December 19, 1988, the Third Circuit

denied Petitioner's rehearing.

The jurisdiction of this Court to review the judgment of the Third Circuit Court of Appeals and the Middle District of Pennsylvania is invoked under 28 U.S.C. §1254(1).

STATUTE (RULE) INVOLVED

Federal Rule of Civil Procedure 15. Amended and Supplemental Pleadings.

STATEMENT OF THE CASE

The jurisdiction of the District Court was invoked under 20 U.S.C. §1331 because of the civil action arising under the laws of the United States, General Federal

Question Jurisdiction.

At all times relevant hereto, the Petitioner was employed as a millwright by Bethlehem Steel Corporation at the Corporation's plant in Steelton, Pennsylvania. He began his employment at Bethlehem Steel in September, 1972.

Respondents, Donald J. Spang and Robert A. Yohe, were employed by Bethlehem Steel as members of the management of the company. Spang held the position of Superintendent/ Labor Relations and Safety and Yohe served as Superintendent of the Control Department. In July, 1984, the Mechanical Department to which the Petitioner was assigned came under the Control Department and Yohe's supervision.

Petitioner's employment by Bethlehem Steel Corporation is governed by a Collective Bargaining Agreement which was entered into between the employer, Bethlehem Steel Corporation, and the United Steel Workers of America, and its local union. The Agreement was entered into by Respondent Union for the benefit of the employees, including the Petitioner.

In August, 1984, Bethlehem Steel Corporation sought to discharge Petitioner for an alleged violation of the terms of his employment as provided for in the Collective Bargaining Agreement. Bethlehem Steel Corporation sought to discharge the Petitioner as a result of an alleged assault

committed by him against a fellow employee in August, 1984. Petitioner denied that he ever assaulted any fellow employee and alleges that there existed no just cause for the seeking of his dismissal as required by the Collective Bargaining Agreement. It is Petitioner's contention that the true reason for the corporation's attempt to discharge him was that he was active in union activities and that he was a member of the Plant Wide Union Safety Committee. The Petitioner was being considered for a management position and the agents of Bethlehem Steel Corporation, Spang and Yohe, did not wish to see him permitted to such position. In an effort to rid itself of the

Petitioner as an employee, the corporation testified on January 20, 1986 before an Arbitrator, that Petitioner did, in fact, commit an assault against a fellow employee, which testimony, if believed, would be considered a dischargeable offense finding which would subject the Petitioner to immediate discharge proceedings. At that Arbitration hearing on January 20, 1986, the Union was present and represented by legal counsel.

Appropriate procedures regarding grievances which are to be followed by an employee sought to be disciplined were complied with. On May 22, 1986, an umpire issued a finding that the Petitioner should be suspended for thirty (30) days

without pay and did not find that the Bethlehem Steel Corporation's investigation of the alleged assault was improper as the Petitioner had alleged. This hearing held by the impartial umpire was wholly inadequate as the umpire allowed and considered hearsay testimony, hearsay upon hearsay testimony and did not require testimony from eyewitnesses regarding the events of the alleged assault.

Ultimately, the Petitioner suffered the imposition of a suspension from work. Bethlehem Steel Corporation's agents conspired to permit the Petitioner's discharge and to permit the thirty (30) day suspension imposed and confirmed at the grievance hearing

to stand although there was no just cause therefor. This action was in violation of the duty to make an impartial and fair investigation of all facts. In addition, the agents of Bethlehem Steel Corporation, Spang and Yohe, deliberately caused the Petitioner financial harm by seeking the initial discharge and suspension of the Petitioner from employment when they had the option of allowing the Petitioner to continue to work. Further, the corporation, through its agents, Spang and Yohe, deliberately stopped the payment of two (2) weeks' vacation pay that Plaintiff was due from his previous year as a result of the investigation being undertaken by Bethlehem Steel

Corporation. This deliberate action forced the Petitioner to take a scheduled vacation subsequent to the suspension and effectually imposed an additional two (2) week suspension on the Petitioner.

From the very first discharge hearing held on August 31, 1984, before a Hearing Officer, every Respondent named herein was fully aware of the proceedings. Each Respondent was fully informed of every subsequent action taken involving the Petitioner and his alleged violations of the terms of his employment. In fact, at an arbitration hearing held on January 20, 1986, Petitioner and all Respondents were present. The Respondents were fully aware of the

exact nature of the proceedings at least by that date.

Following compliance with all the procedures as provided for in the Agreement, and fully within all applicable Statute of Limitations for filing an action, Plaintiff commenced his suit in the Court of Common Pleas of Dauphin County, Pennsylvania. The limitation period did not begin to run until May 22, 1986 when the impartial umpire issued a decision and Petitioner filed his Complaint on October 23, 1986.

During the entire process of the grievance procedure, the Respondents herein acted in concert to deprive the Petitioner of certain rights. Subsequent to the

grievance procedure, Petitioner discovered certain facts which disclosed that evidence and other documentation was suppressed and forged. Further, Petitioner discovered that several Respondents colluded to present testimony in a disfavorable light against the Petitioner. The Petitioner discovered defamatory statements and remarks were made about him by Respondents Yohe and Spang throughout the grievance procedure. Upon discovering these facts, the Petitioner sought to redress the injuries which he sustained at the hands of the Respondents. Petitioner filed a Complaint in the Court of Common Pleas of Dauphin County, Pennsylvania on October 23,

1986.

Throughout this entire process, Petitioner was proceeding pro se. As a pro se litigant, Petitioner was not fully or completely aware of all the technical requirements that needed to be complied with in order to proceed under Section 301 of the Labor Management Relations Act, 29 U.S.C. §185. Nevertheless, all Respondents herein had full knowledge not only of all the facts in the case but also of the technical requirements of the Labor Management Relations Act and were fully aware that but for the fact that the Petitioner was proceeding pro se and lacked technical legal knowledge, they would have been

included in the original suit. In fact, in the Petition for Removal, Respondents cite the Labor Management Relations Act for the basis of removal.

Subsequent to the filing of the original Complaint by the Petitioner, Petitioner became aware of certain other facts concerning allegations that he presented in his original Complaint. Through this discovery, the Petitioner was able to clarify his cause of actions against the various Respondents and, as stated previously, became aware of the technical requirement of having the employer, Bethlehem Steel Corporation and the Union, to be parties to the action under Section 301. With this knowledge, the

Petitioner filed the Motion for Leave to file an Amended Complaint and said Motion was granted.[1] Petitioner then filed his Amended Complaint which included as party Defendants the employer, Bethlehem Steel Corporation and the Union, United Steel Workers of America, Local Union No. 1688 of the United States Steel Workers of America.

After the Amended Complaint was filed, Respondents Spang and Yohe filed a Motion for Summary Judgment. This Motion was granted by the United States District Court

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[1] Petitioner consulted private counsel concerning this limited aspect of the case, but an appearance of counsel was not entered.

for the Middle District of Pennsylvania. The Respondents, Bethlehem Steel Corporation and the Union, filed a Motion to Dismiss the Complaint as to them. The employer and the Union alleged that the Complaint was not timely filed. In granting this Motion, the District Court held that the Petitioner, by filing his Amended Complaint, did not comply with Federal Rule of Civil Procedure 15 regarding the relation back of a cause of action.

The Third Circuit summarily affirmed the decision of the District Court and denied Petitioner's rehearing request on December 19, 1988.

REASONS FOR GRANTING THE WRIT

1.

RESPONDENTS, BETHLEHEM STEEL CORPORATION AND LOCAL UNION NO. 1688 OF THE UNITED STEELWORKERS OF AMERICA, HAD SUFFICIENT KNOWLEDGE OF PETITIONER'S CLAIMS, ALLEGING CERTAIN ACTS PERFORMED BY ITS AGENTS IN VIOLATION OF HIS RIGHTS, INCLUDING BREACH OF DUTY OF FAIR REPRESENTATION SUCH THAT FEDERAL RULE OF CIVIL PROCEDURE 15 IS APPLICABLE AND PETITIONER'S AMENDED COMPLAINT PROPERLY RELATES BACK TO THE DATE WHEN THE INITIAL COMPLAINT WAS FILED.

The Federal Rules of Civil Procedure must be analyzed in this Petition in order to determine whether the Petitioner may amend his Complaint and in this case, additional consideration must be

given in light of the fact that Petitioner proceeded pro se. The lack of knowledge of a particular technical legal requirement cannot be allowed to defeat Petitioner's claim, especially since he attempted to correct his Complaint immediately after he learned of the requirement.

Subsection (a) of Federal Rule of Procedure 15 states that "a party may amend his pleadings . . . only by leave of Court . . .; and leave shall be freely given when justice so requires." (Emphasis applied.) Further, Subsection (c) of Rule 15 states that "whenever the claim asserted in the amended pleading arose out of conduct, the transaction, or occurrences set forth . . . in the original

pleading, the amendment relates back to the date of the original pleading." An amendment changing the party against whom a claim is asserted or changing a claim asserted relates back if the foregoing provision of Subsection (c) is satisfied, and, within the period provided by law for commencing the action against him, the party to be brought in by amendment has received such notice of the institution of the action that he will not be prejudiced in maintaining his defenses on the merits, and knew or should have known, but for a mistake concerning the identity of the proper party, the action would have been brought against him. In this case, Respon-

dents, Bethlehem Steel Corporation and the Union, were well aware of the commencement of the lawsuit by the Petitioner, would not be prejudiced, and knew that they should have been sued initially.

Bethlehem Steel Corporation and the Union claim that the Petitioner purposely omitted naming them as a party Defendant in the original action. The omission of Bethlehem Steel Corporation and the Union as parties was done so only due to the lack of knowledge of the Petitioner, acting pro se, of the requirement that under an action brought under Section 301 of the National Labor Relations Act, the employer and the Union must be parties.

First, the Petitioner, again, acting pro se, without the specific knowledge and legal training of a member of the bar, failed to realize that the action which he was bringing was a Section 301 action. Not knowing that his action was under Section 301 and not knowing the requirements that the employer, Bethlehem Steel Corporation, and the Union must be brought in as parties, the Petitioner failed to do so. In the opinion of the District Court of June 8, 1988, the Court claims that other documents reveal Petitioner's deliberate choice not to sue the corporation and refers to Paragraph 11 of his Response to the Petition for Removal. It is in this paragraph of the Petition for

Removal that the allegation that the action is one under Section 301 is found. The Respondents were aware of this fact when the original Complaint was filed. Petitioner, due to lack of knowledge, incorrectly denies the fact that the action is one under Section 301. It is wholly inappropriate for the Respondents, with the Court's acquiescence, to take advantage of Petitioner in this manner. It is clear that Petitioner misstated a technicality of law. The corporation and the District Court cannot use this misstatement against the pro se litigant. Paragraph 11 of the Petition for Removal is an example of inadvert omission, not deliberate omission.

Petitioner's cause of action was not actually determined to be an action under Section 301 until May 19, 1987 when the District Court so decided. The District Court admitted that difficult issues of removed jurisdiction and preemption were involved. When the District Court has difficulty with the issue, and denies remand because the action is one under Section 301, and issues its decision five (5) months after the Petition to remand was filed by Petitioner, it is wholly unfair to require Petitioner, acting pro se, to know his action is actually properly brought under Section 301 and then use this lack of knowledge against him in dismissing his

Complaint as untimely.

Immediately upon learning that the corporation employer and Union were required parties, the Petitioner set forth actions to cure this technical defect in his pleadings. In the Opinion of the Honorable Sylvia H. Rambo, United States District Judge, dated June 8, 1988, the Court states that although Plaintiff was aware of certain facts, he "chose not to sue the corporation in his original Complaint". The failure to sue the corporation and the Union in the original Complaint was due solely to the lack of legal knowledge of the Petitioner. This requirement is difficult and technical. Petitioner did not even know of this

requirement until the District Court decided this admittedly difficult issue. Bethlehem Steel Corporation and the Union, however, at the time the original Complaint was filed, were aware of all of the actions involved in this case and were certainly cognitive of the fact that they may be sued as a party Defendants. It was they who initially raised the Section 301 issue. Again, the decision not to sue the corporation in the original Complaint was not a voluntary action based on legal knowledge.

Further, the Court in that Opinion dismissing the Complaint against the employer, states that Petitioner claims that the individual Defendants were not

acting as agents of the Bethlehem Steel Corporation. These statements made by the Petitioner were made only because he was not fully aware of the technical requirements of Section 301. A liberal reading of Petitioner's Complaint, as is required by the Rules of Procedure, sets forth causes of action against the Union and the employer as well as the individual Defendants.

In the opinion of the District Court of November 7, 1987, the Court states that Defendants, Spang and Yohe, participated in grievance proceedings and made defamatory statements in their official capacities as employee/ managers. The Court states that individual union members cannot be

liable for damages under a Section 301 action. The Court goes on to state that the liability sought to be imposed on Spang and Yohe was born of their activities on behalf of the corporation. This is directly contrary to what the Court previously stated regarding Petitioner's allegations against the individuals. The District Court, in its later opinion dismissing the Complaint as against the corporation, dated June 8, 1988, relies on pro se Petitioner's inaccurate statements that the individual Defendants were not acting in their official capacity. The District Court cannot hold that Spang and Yohe were agents of the corporation in one opinion and hold

that they were not agents in another opinion. This inconsistency by the District Court must be reconciled.

In this case, it is clear that the requirements of Rule 15 are met such that the amended pleading must relate back. Further, justice and fairness, as set forth in Rule 15, requires that the Amended Complaint filed by the Petitioner relate back to the date of the original Complaint. Rule 15 serves to ameliorate the effect of the Statute of Limitations where the Plaintiff has sued a wrong party or less than all the proper parties and the proper party or remaining proper parties have received adequate notice of the institution of the action. Bloomfield Mechanical

Contracting, Inc. v. Occupational Safe and Health Review Commission, 519 F.2d 1257 (3d Cir. 1975). Because the interest of justice would be served by permitting the Petitioner to proceed with his Amended Complaint, the permission for the Plaintiff to do so must be freely given. Howze v. Jones and Laughlin Steel Corporation, 750 F.2d 1208 (3d Cir. 1984).

The most important consideration in a Court's determination as to whether to grant leave to amend a Complaint under Rule 15 is whether there will be any prejudice to the opposing party. Southwest Marine, Inc. v. Campbell Industries, 616 F. Supp. 253 (S.D. Cal. 1985). Petitioner herein asserts that

absolutely no prejudice will result to any party involved and, therefore, the Amended Complaint should be allowed to proceed. The purpose of Rule 15 is to assist the disposition of litigation on the merits rather than have pleadings become ends in themselves. Summit Office Park, Inc. v. United States Steel Corporation, 639 F.2d 1278 (5th Cir. 1981). The function of Rule 15 is to provide parties the opportunity to assert new matters that may not have been known to them at the time they filed the original pleading. Johnson v. Helicopter and Airplane Services Corporation, 389 F.Supp. 509 (D. Md. 1974). The purpose of allowing amendments is to promote final decision on the merit

of the case, not on technicalities. Reaves v. Sielaff, 382 F.Supp. 472 (E.D. Pa. 1974). In this case, the failure to join the employer and the union is a technicality. Final disposition of Petitioner's claims in this case must be made on the merits. The addition of the Defendants' employer and union will bring all the proper parties before the Court such that the litigation can proceed and be decided upon the merits.

In Justice v. Fabey, 541 F.Supp. 1019 (E.D. Pa. 1982), the Court held that leave to amend the Complaint under Rule 15 should be liberally granted in the absence of undue prejudice to the opposing parties. In Justice, the Plaintiff

was entitled to amend his Complaint where the Motion was filed in good faith and no prejudice resulted to the parties. In the present case, Petitioner's Motion was presently timely and in good faith. In fact, immediately after Petitioner realized the technical requirements, he proceeded to correct these errors and attempted to proceed on the merits. Knowledge of this technical error was known to the corporation and the Union long before the Petitioner became aware of these facts. The Amended Complaint against the Union and the corporation should not have been dismissed, but the case should have proceeded on the merits. The Petitioner did not unduly delay in

proceeding to correct his errors. In fact, delay is not fatal to a Motion to Amend a Complaint. The Courts must balance any delay against the benefits of the liberal interpretation of the Federal Rules of Civil Procedure, fairness and judicial economy. The parties sought to be added to the Complaint were completely aware that but for the mistake of the Petitioner concerning the identity of the proper parties, the action would have originally been brought against them also. In this case, because of the corporation's and union's knowledge of the legal requirement, prohibiting the Complaint to proceed against them will not result in any prejudice.

Federal Rule of Civil Procedure 21 is also relevant. This Rule awards broad discretion of a Court to add parties at any time and is additional authority to permit the Complaint to proceed on the merits against the additional Defendants, Bethlehem Steel Corporation and the Union. The purpose of this Rule is to permit the bringing in of a party who through inadvertence, mistake or for some other reason, had not been made a party in his presence as a party as later found to be necessary. Fair Housing Fund Development v. Berk, 55 F.R.D. 414 (E.D. NY 1972).

The parties which the Petitioner sought to join in his first Amended Complaint were clearly

inadvertently omitted solely due to the Petitioner's lack of knowledge of the technical requirement that the parties are required to be joined in order to completely commence an action under Section 301. This factor, along with the fact that a District Court Judge did not rule that the action was actually one properly under Section 301 until May 19, 1987, clearly absolves the Petitioner of any fault in failing to join these parties originally. As soon as the Petitioner became aware of this requirement, he moved to correct it by filing his Amended Complaint.

Finally, Petitioner, in seeking to amend his Complaint, filed a proper Motion. This Motion

was accompanied by a Brief which thoroughly discussed Rule 15, and the applicability of the relation back principle. After review of the arguments regarding Rule 15, the District Court granted Petitioner's Motion to Amend his Complaint, acquiescing with his argument that the Amended Complaint did in fact properly relate back. The Court then dismissed the Complaint against Respondents, Bethlehem Steel and the Union, for failure to comply with Rule 15. Such inconsistent decision needs to be addressed and ultimately corrected.

PRO SE PETITIONER MUST BE GIVEN LATITUDE IN HIS PLEADINGS SUCH THAT RESPONDENTS MAY NOT RELY ON INCORRECT STATEMENTS OF LAW MADE BY PRO SE PETITIONER IN HIS COMPLAINT REGARDING CERTAIN ACTIVITIES AND MAY NOT TAKE ADVANTAGE OF PRO SE PETITIONER'S LACK OF KNOWLEDGE OF TECHNICAL LEGAL REQUIREMENTS, TO INVOKE THE PROTECTIONS OF RULE 15 IN VIOLATION OF PETITIONER'S CONSTITUTIONAL RIGHT OF DUE PROCESS, WHEN RESPONDENTS HAD ACTUAL KNOWLEDGE TO THE CONTRARY AT THE TIME THE COMPLAINT WAS FILED.

The Petitioner proceeded pro se. Because he brought this case pro se, he must be given greater consideration by the Court. A pro se litigant cannot be held to the same high standards as a member of

the bar. Pack v. South Carolina Wildlife and Marine Resources Department, 92 F.R.D. 22 (D. S.C. 1981).

Petitioner in his Complaint alleged more than just defamation by Spang and Yohe against him in the grievance procedure. In his Complaint, Petitioner also alleged that the individual Defendants acted deliberately to cause him substantial financial harm. Given a liberal pleading of the Petitioner's Complaint, as is required by Federal Rules, it is clear that more than one cause of action was alleged against the individual Defendants. The Decision of the District Court of November 9, 1987, states that the action of the

Petitioner against Spang and Yohe was adjudged to be recharacterized as a claim brought pursuant to Section 301 of the Labor Management Relations Act. Such claim was only part of the claim which Petitioner brought against the Defendants. The District Court addresses only the Petitioner's claims of defamation made during the grievance proceeding. The District Court Opinion fails to address any of the other causes of action which the Petitioner brought against the individual Defendants including the deliberate action of stopping payment on Petitioner's check. The liability sought to be imposed upon the individual Defendants, Spang and Yohe, was not borne solely out of

their activities on behalf of the corporation and in compliance with the Bargaining Agreement as stated by the Court. This decision totally ignores other factors of the Petitioner's pro se Complaint. A liberal reading of that Complaint must be given and a Petitioner must have an opportunity to present all his claims which he has filed against these Defendants.

The decision of the District Court of June 8, 1988 in dismissing the Complaint against the Respondent Bethlehem Steel Corporation ignores the fact that counsel for the individual Defendants is also counsel for the Bethlehem Steel Corporation and it is unreasonable to believe that the corporation had

no knowledge of the Complaint and no knowledge that but for a mistake concerning the identity of the proper party, the action would have been brought against them. This is a situation where a corporation with counsel clearly took advantage of a pro se Petitioner and chose to hide behind Petitioner's lack of knowledge of technical legal requirements to avoid the litigation of meritorious claims.

The effects of holding a pro se civil litigant to strict compliance with procedural rules must be addressed. Holding civil litigants to strict compliance may deter those with meritorious claims from bringing actions. The result places in jeopardy the pro se litigants'

constitutional right to a meaningful opportunity to be heard. Pro se litigants deserve the minimum due process rights to which all other litigants are entitled.

The most significant of these rights is an opportunity to be heard granted at a meaningful time and in a meaningful manner. Logan v. Zimmerman Brush Company, 455 U.S. 422 (1982). Other minimum due process protections include the requirement of adequate notice, the right to a neutral and detached decision maker, the right to present evidence and confront and cross-examine witnesses. Due process is flexible and calls for procedural protections as the particular situation demands. In the present

case, Petitioner's situation demanded flexible procedural protection allowing his Amended Complaint to relate back and permit the joinder of the party Defendants, Bethlehem Steel Corporation and the Union. Pro se litigants have a protected interest in a meaningful opportunity to be heard. The procedures used must comport with due process. A pro se civil litigant's constitutionally protected interest is in a meaningful opportunity to be heard. If one cannot proceed at all, one clearly has lost more than simply damages sought because the meaningful opportunity to be heard is itself a protected interest. A pro se litigant deserves a fair and

efficient viewing of his claims.

A pro se civil litigant's lack of knowledge must be determined to be a shield rather than a sword for the Court to use to deter from suing or defeat him in Court when he does sue. Courts must treat pro se litigants so as to alleviate unfair procedural systems. In the case of Connolly v. Connolly, 316 S.2d 167 (La. App. 1975), the Appellant was represented by counsel at trial, however, proceeded pro se on appeal. Motion for attorneys' fees and dismissal of a frivolous appeal was filed against him. The Louisiana Appeals Court held that since the Defendant was a lay person, they could not hold him to the same standards of skill and judgment

which must be attributed to an attorney. No attorneys' fees were granted. Armstrong v. Manzo, 380 U.S. 545, 552 (1965) holds that a fundamental requirement of due process is the opportunity to be heard. It is an opportunity which must be granted at a meaningful time and in a meaningful manner. Due process, unlike some legal rules, is not a technical concept with a fixed content unrelated to time, place and circumstances. It is a flexible rule and calls for such procedural protections as the particular situation demands. Absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the

judicial process must be given a meaningful opportunity to be heard. Little v. Streeter, 452 U.S. 1 (1981).

This meaningful opportunity to be heard should have been granted to Petitioner in the first instance by the District Court. All parties knew, from the very beginning of this action, that the Petitioner was alleging certain violations and that all parties involved were subject to suit based on the Petitioner's allegations. Nevertheless, the District Court and the several Respondents chose to stand behind technical deficiencies in the Petitioner's pro se proceedings. Reliance on such acts of the Petitioner and using them to dis-

miss the Complaint are clearly inappropriate and unjust. The Petitioner's Complaint should be given a liberal reading. In this case, his Complaint was not even given a fair reading as the only issue raised by the Motion of Spang and Yohe for summary judgment is a defamation issue and clearly a liberal reading of the Petitioner's Complaint sets forth more than just this cause of action. Likewise, in the Complaint against the Union and corporation, it is clear that all the parties were aware that they may be brought in as party Defendants at the first instance. Their allegations that they had no knowledge that may have been parties to this action are completely without basis.

Further, the District, Court, after reviewing Petitioner's Motion to file an Amended Complaint and supporting Brief, granted the Motion. The Brief thoroughly argued the applicability of Rule 15. Then, upon motion from Respondents, the Court, relying on clearly inaccurate statements and allegations of the Petitioner, dismissed the Complaint.

In the case of Haines v. Kerner, 404 U.S. 519 (1972), this Court held that it holds allegations of a pro se Complaint to less stringent standards than formal pleadings drafted by lawyers. So must be the case with the present Petitioner's Complaint. The rights of pro se litigant and the due process protections due him in this

case must be assessed. The rights which must be afforded Petitioner must be set forth as guidelines for District Courts to follow when dealing with pro se litigants.

CONCLUSION

For these various reasons, this Petition for Certiorari should be granted. Petitioner sets forth that his treatment by the representative Respondents and the lower Court were inappropriate considering his pro se position. All requirements of Rule 15 had been met and Petitioner's failure to comply with a technical requirement has permitted the Court to dismiss his meritorious claims. Petitioner

must be granted an opportunity to present the merits of his case and all the allegations set forth against all the Defendants in his Amended Complaint.

Respectfully submitted,

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Date: March 16, 1989

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-5555

MICHAEL KINDNESS,
Appellant

v.

DONALD J. SPANG and ROBERT A. YOHE,
BETHLEHEM STEEL CORPORATION
UNITED STEELWORKERS OF AMERICA,
LOCAL UNION NO. 1688 OF THE
UNITED STATES STEELWORKERS
OF AMERICA

(Civil No. 86-1634 -
M.D. Pa. - Scranton)

SUR PETITION FOR REHEARING

PRESENT: GIBBONS, Chief Judge, SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD and GARTH, Circuit Judges.

The petition for rehearing filed by appellant in the above captioned matter having been submitted to the judges who participated in the decision of this

court and to all the other available circuit judges of the circuit in regular active service, and treating the petition as timely, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court:

/s/Seitz
Circuit Judge

DATED: December 19, 1988

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-5555

MICHAEL KINDNESS,

Appellant

v.

DONALD J. SPANG and ROBERT A. YOHE,
BETHLEHEM STEEL CORPORATION
UNITED STEELWORKERS OF AMERICA,
LOCAL UNION NO. 1688 OF THE
UNITED STATES STEELWORKERS
OF AMERICA

(Civil No. 86-1634 -
M.D. Pa. - Scranton)
District Judge:
Honorable Sylvia H. Rambo

Submitted Under Third
Circuit Rule 12(6)
October 31, 1988
BEFORE: SEITZ, COWEN, and
GARTH, Circuit Judges.

JUDGMENT ORDER

After consideration of the contentions raised by appellant, and finding no error in the ruling of

the district court, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

By the Court,

/s/ Seitz
Circuit Judge

ATTEST:

/s/ Sally Mrvos
Sally Mrvos, Clerk

DATED: November 18, 1988

IN THE UNITED STATES DISTRICT
COURT FOR THE MIDDLE DISTRICT
OF PENNSYLVANIA

CIVIL ACTION NO. 86-1634

MICHAEL KINDNESS,
Plaintiff

v.

BETHLEHEM STEEL CORPORATION,
DONALD J. SPANG and
ROBERT A. YOHE,
Defendants

ORDER

In accordance with the accompanying memorandum, IT IS HEREBY ORDERED THAT:

1) Defendant Bethlehem Steel Corporation's motion to dismiss is granted;

2) The Clerk of Court is directed to enter judgment in favor of defendants Spang and Yohe and against plaintiff in accordance with

this court's memorandum and order of November 9, 1987; and

3) The Clerk of Court is directed to close the file.

/s/ Sylvia H. Rambo
Sylvia H. Rambo
United States
District Judge

Dated: June 8, 1988

IN THE UNITED STATES DISTRICT
COURT FOR THE MIDDLE DISTRICT
OF PENNSYLVANIA

CIVIL ACTION NO. 86-1634

MICHAEL KINDNESS,
Plaintiff

v.

BETHLEHEM STEEL CORPORATION,
DONALD J. SPANG and
ROBERT A. YOHE,
Defendants

MEMORANDUM

Procedural Background

Plaintiff, pro se, has sued his employer, Bethlehem Steel Corporation (the corporation or Bethlehem Steel), two of its supervisors, Donald J. Spang and Robert A. Yohe, his union, Local Union 1688 of the United Steelworkers of America, and the United Steelworkers of America (the

Unions). In his original complaint with Spang and Yohe as sole defendants, plaintiff alleged Spang and Yohe defamed him at a hearing on charges that he assaulted a fellow employee. In an amended complaint, plaintiff realleged the defamation charges and added as party defendants the corporation and the Unions. Plaintiff alleged a cause of action against the Unions for breach of their duty of fair representations. Plaintiff alleged, although not in so many words, a cause of action against the corporation for wrongful suspension after an inadequate investigation and corrupt hearing.

This action was first filed in the Court of Common Pleas of

Dauphin County, Pennsylvania. Original defendants Spang and Yohe removed the action to this court. Plaintiff's subsequent petition for remand was denied. An uncontested motion for leave to file an amended complaint was granted, and that complaint was filed July 10, 1987. On October 2, 1987, the court granted a motion to dismiss filed by the Unions. On November 9, 1987 the court granted a motion for summary judgment in favor of the movants, defendants Spang and Yohe. Currently pending before the court is a motion to dismiss filed by Bethlehem Steel. Because plaintiff has failed to file a brief in response, this motion is deemed unopposed. The court will address

the merits nonetheless.

Bethlehem Steel moves for dismissal of plaintiff's amended complaint on two grounds: (1) failure to state a cause of action because the claim is time barred under the six months statute of limitations period of the National Labor Relations Act, Section 10(b), 29 U.S.C. Section 160(b)(1975) (section 10(b)), and plaintiff does not meet the requirements for relation back of amended pleadings as set forth in Federal Rule of Civil Procedure 15(c) (Rule 15(c)); and (2) plaintiff's claim against the corporation cannot be maintained because plaintiff cannot satisfy the prerequisite of first successfully suing the Unions for

breach of their duty of fair representation. The court exercises its jurisdiction pursuant to 28 U.S.C. Section 1331.

Factual Background

The undisputed facts are as follows. At all times relevant to this action plaintiff was employed as a millwright by Bethlehem Steel at the corporation's Steelton plant in Steelton, Pennsylvania. Defendant Yohe and Spang were employed as managers at the corporation's Steelton plant.

Plaintiff's employment was governed by a collective bargaining agreement, dated March 1, 1983, to which plaintiff's Union and the corporation were parties.

On August 16, 1984, Spang was told by Yohe of an alleged incident of fighting between Plaintiff and another employee Clarence White. Allegedly, plaintiff grabbed White's head in a hammerlock hold, injuring White's right eye and damaging his eye glasses. At the conclusion of the corporation's investigation, plaintiff was notified, in accordance with the requirements of the bargaining agreement, of management's decision to suspend him with intent to discharge him.[1] Plaintiff informed spang, by written

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[1]There is no dispute the bargaining agreement's technical requirements were met at all stages of the hearing and grievance proceedings.

notice, he would appeal management's decision. Plaintiff was then sent a letter which stated the reasons for his discharge.

A discharge hearing was conducted on August 31, 1984 before a hearing officer. Plaintiff, the Union and Spang were in attendance. The hearing officer, in a memorandum to Spang dated September 5, 1984, recommended plaintiff not be discharged but suspended for thirty (30) days without pay. Management adopted this recommendation, and notified plaintiff in writing on or about September 6, 1984.

The Union filed a grievance on behalf of plaintiff on or about September 10, 1984. Plaintiff was represented by the Union throughout.

Plaintiff's grievance was ultimately denied, and the Union appealed plaintiff's grievance to arbitration.

The arbitration hearing was held on January 20, 1986 before an umpire. Plaintiff was represented by the Union and the Union was represented by counsel. Spang and Yohe testified as to what they learned during the investigation of the alleged altercation. Plaintiff testified, and there were various documents presented as well.

On May 22, 1986 the umpire issued his ruling in favor of the corporation, upholding plaintiff's suspension and denying his grievance. Under the collective bargaining agreement, the umpire's

decision is final and binding on the corporation, the Union, and the employee.

Discussion

The Supreme Court of the United States has ruled the statute of limitations for suite brought by employees against their employers under section 10(b) is six months. Del Costello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983). On its face, plaintiff's complaint is time barred. The hearing in question took place on January 20, 1986. Plaintiff's cause of action accrued no later than May 22, 1986, the date of the adverse arbitration decision. The amended complaint was filed

approximately thirteen (13) months after plaintiff's cause of action accrued. To survive a dismissal motion on limitations grounds, the amended complaint would have to meet the relation back requirements of Rule 15(c).

The relevant part of Rule 15(c) provides:

> [w]henever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against the party to be brought in by amendment that party (1) has received such notice

> of the institution of the action that the party will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

To meet the requirements for relation back, and thus withstand a motion to dismiss on limitations grounds, a plaintiff must meet all three criteria of Rule 15(c). Varlack v. SWC Caribbean, Inc., 550 F.2d 171 (3d Cir. 1977). Kindness does not meet the third criteria: "knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought

against the party."[2]

In the case at bar, Plaintiff does not seek to substitute one defendant for another, nor does he seek to correct a mere misnomer. In naming the corporation, he has added an entirely new party defendant. "As a general rule, an amendment pursuant to Rule 15 ... relates back only to the matters relating to the original parties of the complaint, or to correct a misnomer or a misdescription of defendant, and not

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[2]Bethlehem Steel argues plaintiff does not meet any of the three criteria in Rule 15(c). The court does not express an opinion as to whether plaintiff meets the first criteria: same "conduct, transaction, or occurrence," or the second criteria: adequate "notice of the institution of the action."

to add or substitute a new party defendant." United States v. Western Casualty and Surety Co., 350 F.2d 521 523 (6th Cir. 1966).

The benefits of rule 15(c) do not inure to a plaintiff seeking to add new parties unless "prior to the expiration of the limitation period, the new defendant knew (or should have known) that his joinder was a distinct possibility." Taliferro v. Costello, 467 F.Supp. 33, 36 (E.D.Pa. 1979). To determine whether Bethlehem Steel should have known its joinder was a "distinct possibility" the court turns to the original complaint. At the time the original complaint was filed, all the event which form the basis for the claims lodged against the

corporation in the amended complaint had already occurred, and plaintiff was fully cognizant of the events:

> - the corporation had already (allegedly by and through its agents Spang and Yohe) allegedly defamed plaintiff at the hearing;
>
> - the corporation had already allegedly suspended him unlawfully;
>
> - the corporation had already introduced allegedly forged documents at the hearing and had already allegedly been in collusion with the Union against plaintiff.[3]

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[3]An argument can be made that plaintiff wa snot aware of the allegedly forged documents and alleged collusion at the time he filed his original complaint.

(Footnote continued on next page.)

Plaintiff's amended complaint at Paragraphs 6, 14, and 23. Although plaintiff was aware of these events and alleged facts, he chose not to sue the corporation in his original complaint.

In addition to simply not naming Bethlehem Steel as a party

(Footnote 3 continued)

[3]However, he was aware of these alleged facts at least as early as August 18, 1986 when he filed an unfair labor practice charge with the NLRB. In that charge plaintiff alleged, inter alia, the Union knew the arbitration award was tainted by improper conduct on the part of Bethlehem Steel and the arbitrator, including unlawful collusion. This August 18, 1986 date does not affect the court's analysis of the limitations issue because the amended complaint was not filed within six months of plaintiff learning these alleged facts.

defendant in the original complaint, plaintiff specifically stated Spang and Yohe did not act as agents of Bethlehem Steel. "Bethlehem Steel and its agents with authority over the Defendants did not at any time require or demand that Defendant [sic] persecute or slander Plaintiff." Plaintiff's original complaint at Paragraph 4. Furthermore, other documents in the record reveal plaintiff's failure to sue Bethlehem Steel was a deliberate choice. See, e.g., Spang's and Yohe's motion for summary judgment at Paragraph 21.

In Larry v. Penn Truck Aids, Inc., 94 F.R.D. 708)E.D.Pa. 1982), the plaintiff sought, in an amended complaint, to bring Unions into the

action asserting breach of the duty of fair representation. As with the case at bar, all material events had taken place prior to the filing of the original complaint, and "[n]othing in the original complaint hint[ed] that [plaintiff] intended to state a claim against [proposed new party defendants]." Id. at 721. As in Larry, plaintiff cannot now, after the statute of limitations has run, bring a cause of action against the corporation based on events which he was fully aware of at the time he filed his original complaint.

Conclusion

The court finds plaintiff does not satisfy Rule 15(c) and his

claim against Bethlehem Steel is barred by the statute of limitations. The court need not address Bethlehem Steel's asserted second ground for dismissal. Bethlehem Steel is the only defendant remaining in this action. Therefore, as the court will grant Bethlehem Steel's motion to dismiss, the court will direct the Court to enter the judgment granted November 9, 1987 in favor of defendants Spang and Yohe and to close the file.

/s/Sylvia H. Rambo
Sylvia H. Rambo
United States
District Judge

Dated: June 8, 1988

IN THE UNITED STATES DISTRICT
COURT FOR THE MIDDLE DISTRICT
OF PENNSYLVANIA

CIVIL ACTION NO. 86-1634

MICHAEL KINDNESS,
Plaintiff

v.

BETHLEHEM STEEL CORPORATION,
DONALD J. SPANG and
ROBERT A. YOHE,
Defendants

ORDER

In accordance with the accompanying memorandum, IT IS HEREBY ORDERED THAT the motion of defendants Spang and Yohe for summary judgment is granted.

/s/Sylvia H. Rambo
Sylvia H. Rambo
United States
District Judge

Dated: November 9, 1987

IN THE UNITED STATES DISTRICT
COURT FOR THE MIDDLE DISTRICT
OF PENNSYLVANIA

CIVIL ACTION NO. 86-1634

MICHAEL KINDNESS,
Plaintiff

v.

BETHLEHEM STEEL CORPORATION,
DONALD J. SPANG and
ROBERT A. YOHE,
Defendants

MEMORANDUM

Factual Background

The undisputed facts are as follows. At all time relevant to this action plaintiff was employed as a millwright by Bethlehem Steel Corporation ("the corporation") at the corporation's Steelton plant in Steelton, Pennsylvania. Defendants Robert A. Yohe and Donald J. Spang were employed as managers at the

corporation's Steelton plant.

Plaintiff's employment was governed by a collective bargaining agreement, dated March 1, 1983, to which plaintiff's union, the United Steelworkers of America, Local Union No. 1688 ("the Union"), and the corporation were parties.

On August 16, 1984, Spang was told by Yohe of an alleged incident of fighting between plaintiff and another employee, Clarence White. Allegedly, plaintiff grabbed White's head in a hammerlock hold, injuring White's right eye and damaging his eye glasses. At the conclusion of the corporation's investigation, plaintiff was notified, in accordance with the requirements of the bargaining agreement, of

management's decision to suspend him with intent to discharge him.[1] Plaintiff informed Spang, by written notice, he would appeal management's decision. Plaintiff was then sent a letter which stated the reasons for his discharge.

A discharge hearing was conducted on August 31, 1984 before a hearing officer. Plaintiff, the Union and Spang were in attendance. The hearing officer, in a memorandum to Spang dated September 5, 1984, recommended plaintiff not be discharged but suspended for thirty

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[1]There is no dispute the bargaining agreement's technical requirements were met at all stages of the hearing and grievance proceedings.

(30) days without pay. Management adopted this recommendation, and notified plaintiff in writing on or about September 6, 1984.

The Union filed a grievance on behalf of plaintiff on or about September 10, 1984. Plaintiff was represented by the Union throughout. Plaintiff's grievance was ultimately denied, and the Union appealed plaintiff's grievance to arbitration.

The arbitration hearing was held on January 20, 1986 before an umpire. Plaintiff was represented by the Union and the Union was represented by counsel. Spang and Yohe testified as to what they learned during the investigation of the alleged altercation. Plaintiff

testified, and there were various documents presented as well.

On May 22, 1986 the umpire issued his ruling in favor of the corporation, upholding plaintiff's suspension and denying his grievance. Under the collective bargaining agreement, the umpire's decision is final and binding on the corporation, the Union, and the employee.

Procedural Background

Plaintiff filed a suit, pro se, against Spang and Yohe in the Court of Common Pleas of Dauphin County, Pennsylvania, wherein he alleged they defamed him at the discharge hearing of August 31, 1984. Spang and Yohe removed the

action to this court, and plaintiff's subsequent petition for remand was denied. Spang and Yohe filed and briefed a motion for summary judgment, and plaintiff filed a brief in opposition. Plaintiff filed a motion to file a first amended complaint. Spang and Yohe did not oppose the motion, but filed a brief in response to it. Therein, they indicated their summary judgment motion should not be deemed withdrawn if the court permitted plaintiff to file the proposed amended complaint because, they contended, the amended complaint would not in anyway affect their summary judgment motion.

The court granted plaintiff's motion to file a first amended

complaint. The amended complaint realleged the defamation charges against Spang and Yohe and added as party defendants the corporation and the Union. Plaintiff alleged, although not in so many words, a cause of action against the corporation for wrongful suspension after an inadequate investigation and a corrupt hearing. Plaintiff alleged a cause of action against the Union for breach of their duty of fair representation.

The Union filed a motion to dismiss with prejudice on limitations grounds. In granting the Union's motion and ordering the Union removed from the action, the court found plaintiff failed to satisfy the relation back require-

ments for amended complaints as set forth in Rule 15(c) of the Federal Rules of Civil Procedure. See this court's order and memorandum dated October 2, 1987.

The court now addresses Spang and Yohe's motion for summary judgment. Mindful of the unusual procedural posture of this summary judgment motion, the court is disposing of the motion on its merits because, as defendant's assert in their response to plaintiff's motion to file an amended complaint, the amended complaint in no way affects the grounds asserted by defendants for summary judgment. Therefore, disposition of this motion is deemed a disposition on a motion for

summary judgment as to the amended complaint.

Discussion

Defendants put forth a number of grounds to support their contention that as a matter of law summary judgment should be granted in their favor. These grounds are: (1) the defamation and breach of contract claims are preempted by federal labor law; (2) the arbitration decision is final, binding and unappealable; (3) plaintiff has failed to plead the Union breached its duty of fair representation (an indispensable predicate for a § 301 action); (4) statute of limitations bars this action; (5) individuals, other than individual employers,

cannot be held personally liable for damages under § 301; (6) defendants enjoy absolute or privileged immunity because their alleged defamatory statements were made in the course of a hearing conducted pursuant to the collective bargaining agreement; (7) plaintiff consented to the statements allegedly made due to his membership in the Union and the terms of the collective bargaining agreement; and (8) the alleged statements were not defamatory and not made with actual malice.

Although plaintiff brought this action against Spang and Yohe as a state tort defamation claim, it was adjudged plaintiff's claim be recharacterized as a claim brought

pursuant to § 301 of the Labor Management Relations Act. 29 U.S.C. § 185 ("§301"). See this court's May 10, 1987 order and memorandum denying plaintiff's petition to remand. There is no dispute Spang and Yohe made the alleged defamatory statements during a grievance proceeding provided for in the collective bargaining agreement. They participated in the proceeding in their official capacities as employee/managers of the corporation and not as private individuals. Thus, the threshold question is whether Spang and Yohe can be sued as individuals under § 301.

The statute itself is silent on that question and there is a dearth of case law directly on

point. On a closely related point, however, the law is very clear individuals cannot be liable for money damages under a § 301 action. Courts have conclusively addressed the issue of whether individual union members can be sued for damages in their individual capacities under § 301.

In the leading case Atkinson v. Sinclair Refining Co., 370 U.S. 238, 249 (1962), the Court ruled individual members of a union could not be liable for damages if the union is liable because of its breach of the collective bargaining agreement. The Third Circuit Court of Appeals, following Atkinson, held individual union members were not liable to the employer for the

activities of their union. The court stated, "[w]here the individual member liability sought to be imposed grows out of activities on behalf of a union with which the plaintiff has a bargaining relationship, ... Atkinson ...appl[ies]." Wilkes-Barre Pub. v. Newspaper Guild of Wilkes-Barre, 647 F.2d 372, 377 (1981).

In a Western District of Pennsylvania case, one issue facing the court was whether individual employees could sue individual members of the union. The court, in dismissing the complaint as to the individuals, cited Atkinson and Wilkes-Barre and stated unequivocally, "an individual, other than an individual employer,

cannot be held personally liable for damages under section 301." Bey v. Williams, 590 F.Supp. 1150, 1155 (W.D.Pa. 1984), aff'd, 782 F.2d 1026 (3d Cir. 1986).

The court finds the instant case very close in kind to the cases discussed. In fact, the language employed by the Wilkes-Barre court is quite appropriate for the situation here: the liability sought to be imposed on Spang and Yohe was born of their activities on behalf of the corporation and in compliance with the bargaining agreement. Therefore, they are not personally accountable to plaintiff for money damages.

Since plaintiff does not seek equitable relief from Spang and

Yohe, and since there is no genuine issue of material fact, Spang and Yohe are entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

/s/Sylvia H. Rambo
Sylvia H. Rambo
United States
District Judge

Dated: November 9, 1987.

IN THE UNITED STATES DISTRICT
COURT FOR THE MIDDLE DISTRICT
OF PENNSYLVANIA

CIVIL ACTION NO. 86-1634

MICHAEL KINDNESS,
Plaintiff

v.

BETHLEHEM STEEL CORPORATION,
DONALD J. SPANG and
ROBERT A. YOHE,
Defendants

ORDER

In accordance with the accompanying memorandum, IT IS HEREBY ORDERED THAT the motion to dismiss on limitations grounds filed by defendants United Steelworkers of America and Local Union No. 1688 of the United Steelworkers of America

is granted and they are removed as parties from this action.

/s/ Sylvia H. Rambo
Sylvia H. Rambo
United States
District Judge

Dated: October 2, 1987.

IN THE UNITED STATES DISTRICT
COURT FOR THE MIDDLE DISTRICT
OF PENNSYLVANIA

CIVIL ACTION NO. 86-1634

MICHAEL KINDNESS,
Plaintiff

v.

BETHLEHEM STEEL CORPORATION,
DONALD J. SPANG and
ROBERT A. YOHE,
Defendants

MEMORANDUM

Background

Plaintiff is suing his employer, Bethlehem Steel Corporation ("the corporation"), two of its supervisors, Spang and Yohe, and his union, Local Union No. 1688 of the United Steelworkers of America and the United Steelworkers of America ("the unions"). In his original complaint with Spang and

Yohe as sole defendants, plaintiff alleged Spang and Yohe defamed him at a hearing on charges that he assaulted a fellow employee. In an amended complaint, plaintiff realleged the defamation charges and adds as party defendants the corporation and the unions. Plaintiff alleged, although not in so many words, a cause of action against the corporation for wrongful suspension after an inadequate investigation and corrupt hearing. Plaintiff's alleged cause of action against the unions is for breach of their duty of fair representation.[1]

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[1]Paragraph 27 of plaintiff's amended complaint represents plaintiff's entire presentation of his cause of action against the unions. It reads:

(Footnote continued on next page)

This action was first filed in

(Footnote 1 continued)

[1]Plaintiff alleges the fact to be that the Union, in breach of its statutory duty of fair representation owing to the Plaintiff under the provisions of the Labor Management Relations Act, acted in an arbitrary and discriminatory manner, did not investigate the claims made by the Defendant, BETHLEHEM STEEL CORPORATION'S, agents, Defendants, SPANG and YOHE, did not actively and in a zealous manner object to the testimony given by the Defendant, BETHLEHEM STEEL CORPORATION'S, agents, Defendants, SPANG and YOHE, at the time of the Arbitration hearing before the impartial

(Footnote continued on next page)

the Court of Common Pleas of Dauphin County, Pennsylvania. Original defendants Spang and Yohe removed the action to this court. Plaintiff's subsequent petition for

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(Footnote 1 continued)

[1]umpire, did not actively and zealously represent the Plaintiff's interests in that various documents and other evidence were not properly cross-examined as to authenticity and correctness, and failed to investigate and call witnesses who would vindicate the Plaintiff as concerns the accusations made by the Defendant, BETHLEHEM STEEL CORPORATION, and its agents, Defendants, SPANG and YOHE.

remand was denied. An uncontested motion for leave to file an amended complaint was granted, and that complaint was filed July 10, 1987. Currently pending before the court is a summary judgment motion filed by defendants Spang and Yohe. The court has stayed discovery in this action until that summary judgment is ruled on. On July 30, 1987 union defendants filed a motion to dismiss with prejudice on limitations grounds. Plaintiff timely filed an opposing brief, and the motion is now ripe for consideration.

Union defendants move for dismissal of plaintiff's amended complaint, as against them, on two grounds: failure to state a cause of

action because the claim is time barred under the six months statute of limitations period of the National Labor Relations Act, §10(b), 29 U.S.C. §160(b),(1975), and failure to meet the requirements for relation back of amended pleadings as set forth in Federal Rule of Civil Procedure 15(c) ("15(c)").

Discussion

A union's breach of its duty to provide fair representation at an arbitration hearing is deemed an unfair labor practice and is governed by the six month statute of limitation in §10(b) of the National Labor Relations Act ("10(b)"). DelCostello v. Teamsters, 462 U.S.

151 (1983). The hearing in question took place on January 20, 1986. Both plaintiff and union defendants agree plaintiff's cause of action against the unions accrued no later than May 22, 1986, the date of the adverse arbitration decision. (Plaintiff's Brief in Support of Notice to File Amended Complaint at 2 and 9; Defendant's Brief in Support of Motion to Dismiss with Prejudice at 5.)[2]

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[2]In his brief in opposition to defendants' motion to dismiss, plaintiff attempts to persuade the court, noteably for the first time, that his cause of action against the unions accrued March 13, 1987 and not May 22, 1986. This is discussed at length infra.

On its face, the claim against the union defendants is time barred by §10(b) because the amended complaint was filed fourteen (14) months after plaintiff's cause of action accrued. Plaintiff, however, argues the amended complaint meets the requirements of §15(c) and so should be deemed filed October 23, 1986, the date the original complaint was filed.

The relevant part of §15(c) provides,

> [w]henever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom

> a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against the party to be brought in by amendment that party (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

To meet the requirements for relation back, and thus withstand a motion to dismiss on limitations grounds, a plaintiff must meet all three criteria of §15(c). Varlack v. SWC Caribbean, Inc., 550 F.2d 171 (3d Cir. 1977). Kindness does not

meet the third criteria: "knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party."[3]

In the case at bar, plaintiff does not seek to substitute one defendant for another, nor does he seek to correct a mere misnomer. In naming the unions he has added entirely new party defendants. But "[a]s a general rule, an amendment

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[3]Union defendants argue plaintiff does not meet any of the three criteria in §15(c). The court does not express an opinion as to whether plaintiff meets the first criteria: same "conduct, transaction, or occurrence," or the second criteria: adequate "notice of the institution of the action."

pursuant to Rule 15...relates back only to the matters relating to the original parties of the complaint, or to correct a misnomer or a misdescription of defendant, and not to add or substitute a new party defendant." United States v. W. Casualty and Surety Co., 359 F.2d 521, 523 (6th Cir. 1966).

The benefits of §15(c) do not inure to a plaintiff seeking to add new parties unless "prior to the expiration of the limitation period, the new defendant knew (or should have known) that his joinder was a distinct possibility." Taliferro v. Costello, 467 F.Supp. 33, 36 (E.D.Pa. 1979). To determine whether the Unions should have known their joinder was a "distinct

possibility" the court turns to the original complaint. At the time the original complaint was filed, all the events which form the basis for the claims lodged against the unions in the amended complaint had already occurred, and the plaintiff was fully cognizant of the event:

> -the unions' alleged inadequate investigation had taken place;
>
> -the unions' alleged arbitrary and discriminatory actions had occurred; and
>
> -the unions had already performed their act of representation at the hearing in an allegedly unsatisfactory manner.

Plaintiff's amended Complaint at

¶27. The unions had no cause to suspect the plaintiff was going to sue them because there was nothing in the original complaint to alert them.

In Larry v. Penn Truck Aids, Inc., 94 F.R.D. 708 (E.D.Pa. 1982) the court was faced with a similar fact pattern and did not permit the addition of certain proposed new party defendants. The plaintiff in Larry sought, in an amended complaint, to bring unions into the action asserting breach of the duty of fair representation. As with the case at bar, although all material events had taken place prior to the filing of the original complaint, "[n]othing in the original complaint hint[ed] that [plaintiff] intended

to state a claim against [proposed new party defendants]." Id. at 721. As in Larry, plaintiff cannot now, after the statute of limitations has run, bring a cause of action against the unions based on events which he was fully aware of at the time he filed his original complaint.

In his brief in opposition at page 5, plaintiff asserts for the first time his cause of action against the unions accrued on March 13, 1987, when he "learned for the first time that defendant Union was whoring with the Company" and not May 22, 1986. Plaintiff complains of the conduct of a particular union member and asserts the union knew of the fraud on the part of the corporation but that it did not act

on that knowledge.[4]

Even though plaintiff was aware of the alleged misconduct of the unions regarding the alleged fraud of the corporation, plaintiff does not base his cause of action

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[4]Defendant unions dispute the date plaintiff claims he became aware of the unions' alleged collusion in the alleged fraud of the corporation. Unions claim plaintiff was aware of this at least as early as August 18, 1986 when plaintiff filed "an unfair labor practice charge with the NLRB alleging that the Unions knew that the award was tainted by improper conduct on the part of the arbitrator and Bethlehem Steel, including unlawful collusion ...and...inaction in the fact of such knowledge." Defendants Unions' Reply Brief at 4. Both dates put forth by the parties as the date plaintiff became aware of the unions' alleged collusion in alleged fraud are prior to the date of the amended complaint. Therefore, regardless of which party is correct as to the date, the court's analysis is unaffected.

against the Union on this alleged misconduct. Rather, he bases it solely on events, as discussed supra, which occurred prior to the filing of the original complaint. Therefore, these assertions about collusion and fraud do not affect the May 22, 1986 accrual date.

Lastly, the plaintiff attempts to raise fraud as a defense to a dismissal on limitations grounds. He asserts the alleged fraud of the corporation kept him from realizing he had a cause of action against the Unions. Plaintiff's Brief in Opposition at 7. This argument is wholly inapplicable here, because as discussed at length supra, plaintiff's stated cause of action

is grounded exclusively on events and knowledge he had prior to the filing of the original complaint. Whatever information he may have gleaned after learning of the alleged fraud and alleged collusion is not incorporated in his cause of action against the unions. And so, plaintiff's allegation of fraud does not save his claim against the unions.

The court finds plaintiff's claim against the unions is time barred and that it does not meet the requirements for relation back. Therefore, plaintiff's claim against the unions will be dismissed.

/s/Sylvia H. Rambo
Sylvia H. Rambo
United States
District Judge

Dated: October 2, 1987.

IN THE UNITED STATES DISTRICT
COURT FOR THE MIDDLE DISTRICT
OF PENNSYLVANIA
CIVIL ACTION NO. 86-1634

MICHAEL KINDNESS,
Plaintiff

v.

DONALD J. SPANG and
ROBERT A. YOHE,
Defendants

ORDER OF COURT

And now this 1st day of July, 1987, upon consideration of the within Motion of Defendants for Protective Order pursuant to Fed. R. Civ. P.26(c)(1), it is hereby ORDERED that all discovery in this action be stayed pending this Court's ruling on Defendants' Motion for Summary Judgment filed with this Court on May 8, 1987.

BY THE COURT:

/s/ Sylvia H. Rambo
District Judge

IN THE UNITED STATES DISTRICT
COURT FOR THE MIDDLE DISTRICT
OF PENNSYLVANIA

CIVIL ACTION
NO. 86-1634

MICHAEL KINDNESS,
Plaintiff

v.

BETHLEHEM STEEL CORPORATION,
UNITED STEELWORKERS OF
AMERICA, LOCAL UNION NO.
1688 OF THE UNITED STATES
STEELWORKERS OF AMERICA,
DONALD J. SPANG and
ROBERT A. YOHE,
Defendants

ORDER

AND NOW, this 1st day of July, 1987, it is hereby ORDERED and DECREED that Plaintiff's Motion for Leave to File Amended Complaint is granted.

/s/ Sylvia H. Rambo
J.

IN THE UNITED STATES DISTRICT
COURT FOR THE MIDDLE DISTRICT
OF PENNSYLVANIA

CIVIL ACTION NO. 86-1634

MICHAEL KINDNESS,
Plaintiff

v.

DONALD J. SPANG and
ROBERT A. YOHE,
Defendants

ORDER

In accordance with the accompanying memorandum, IT IS HEREBY ORDERED THAT plaintiff's petition for remand is denied.

/s/ Sylvia H. Rambo
Sylvia H. Rambo
United States
District Judge

Dated: May 19, 1987

IN THE UNITED STATES DISTRICT
COURT FOR THE MIDDLE DISTRICT
OF PENNSYLVANIA

CIVIL ACTION NO. 86-1634

MICHAEL KINDNESS,
Plaintiff

v.

DONALD J. SPANG and
ROBERT A. YOHE,
Defendants

MEMORANDUM

Procedural Background

Pro se plaintiff Michael Kindness instituted this action in the Court of Common Pleas of Dauphin County, Pennsylvania on or about October 23, 1986. On November 14, 1986, defendants Donald J. Spang and Robert A. Yohe filed a petition for removal of the action to this court, together with a removal bond, pursuant to 28 U.S.C. §§1441 and 1446.

On November 19, 1986, defendants filed their answer to plaintiff's complaint. On November 20, 1986, plaintiff filed a petition to remand, to which defendants responded on December 5, 1987.

Factual Background

Plaintiff is an employee of Bethlehem Steel Corporation (Bethlehem Steel), working at the Steelton plant in Steelton, Pennsylvania. Complaint at ¶1. Defendant Donald J. Spang is employed by Bethlehem Steel as a Superintendent of Labor Relation. Complaint at ¶2. Defendant Robert A. Yohe is employed by Bethlehem Steel as a Superintendent in the Control Department. Complaint at ¶2.

The basis of the complaint against defendants is that they allegedly gave slanderous testimony against plaintiff during a hearing held at Bethlehem Steel-Steelton Plant on January 20, 1986. Complaint at ¶22. On January 20, 1986, an arbitration hearing was conducted at the Steelton Plant between Bethlehem Steel and the United Steelworkers of America, Local Union No. 1688 (Union), concerning Grievance No. 83-07198. Petition for Removal at ¶6. The grievance proceeding was held in accordance with the collective bargaining agreement in effect between Bethlehem Steel and the Union, which agreement governed the terms and conditions of plaintiff's

employment. Petition for Removal at ¶7.

The specific incident which forms the basis of the complaint involves the alleged assault between plaintiff and another Bethlehem Steel Employee on August 16, 1984. Complaint at ¶16. After the incident, as part of their duties as managers of Bethlehem Steel, defendants investigated the charge of an employee dispute. As a result of the investigation, plaintiff was suspended from work for thirty days. Plaintiff subsequently filed a grievance, which culminated in the January 20, 1986 hearing.

At the hearing, defendants testified regarding their investi-

gation and allegedly slandered the plaintiff. Plaintiff seeks damages for the harm allegedly caused to his reputation and for wages lost during the thirty day suspension which was the subject of the grievance filed by plaintiff in accordance with the collective bargaining agreement between Bethlehem Steel and the Union. Complaint at ¶26.

Discussion

The instant case presents some very difficult issues of removal jurisdiction and preemption. Initially the court must note the distinction between the original jurisdiction of the federal courts and the preemption of state substantive law by federal law.

"The field of labor law generally points up the importance of distinguishing between (a) exclusive jurisdiction and (b) the supplanting of state substantive law by federal law. In situation (a), the removed suit must be dismissed because of the derivative nature of removal jurisdiction." 1A Moore's Federal Practice, ¶0.167(8)(2d Ed. 1987).

"If the state court lacks jurisdiction of the subject matter or of the parties, the federal court acquires none, although it might in a like suit, originally brought there, have had jurisdiction." Lambert Run Coal Co. v. Baltimore & Ohio R.R., 258 U.S. 377, 382 (1922). Because plaintiff's complaint alleges the tort of defamation

against defendants, which is a state cause of action, the court is not faced with such a problem here.

In addressing removal jurisdiction Judge Cohill in the United States District Court for the Western District of Pennsylvania stated, "federal courts are courts of limited jurisdiction, the removal statute involved here, 28 U.S.C. §1441, must be strictly construed, and the burden of establishing federal jurisdiction is upon the removing party." Kilmer v. Central Counties Bank, 623 F.Supp. 994, 996 (W.D. Pa. 1985). Accord, LaChemise LaCoste v. The Alligator Company, Inc., 506 F.2d 339, 344 (3d Cir. 1974).

As more recently stated by

the Third Circuit Court of Appeals,

> [i]t is by now well established that the federal question must appear on the face of a well-pleaded complaint. Federal jurisdiction cannot be created by anticipating that a defense based on federal law will be filed to a claim based on state law. Louisville & Nashville Railroad v. Mottley, 211 U.S. 149, 29 S.Ct. 42, 53 L.Ed. 126 (1908).

Trent Realty Associates v. First Federal Savings and Loan Association of Philadelphia, 657 F.2d 29, 33 (3d Cir. 1981). In addition, the court must evaluate the propriety of removal "on the basis of the record as it stands at the time the petition for removal is filed." Westmoreland Hospital Association v. Blue Cross of Western Pennsylvania,

605 F.2d 119, 123 (3d Cir. 1979) (emphasis in original).

In the case at bar, defendants contend as a basis for removal that plaintiff's state law claim "arose out of a dispute governed by the terms and conditions of the collective bargaining agreement." Defendants' Brief in Opposition to Remand at 5. Therefore, defendants argue, the cause of action is governed by federal labor law.

Defendants state that in determining whether a case presents a federal question for purposes of federal subject matter jurisdiction the court must look to the "well-pleaded complaint rule." As recently reiterated by the Supreme

Court,

> [w]hether a case is one arising under the Constitution or a law or treaty of the United States, in the sense of the jurisdictional statute,...must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation of avoidance of defenses which it is thought the defendant may interpose.

Taylor v. Anderson, 234 U.S. 74, 75-76 (1914); Franchise Tax Board of California v. Construction Laborer's Vacation Trust for Southern California, 463 U.S. 1, 10 (1983).

As concluded by Judge Cohill,

> [t]herefore, the fact that a defendant may assert an affirmative, defense grounded upon federal law is not a

> basis for federal jurisdiction. A federal right or immunity must be ascertained as an essential element of the plaintiff's cause of action for the lawsuit to be maintained in federal court. See Gully v. First National Bank, 299 U.S. at 112, 57 S.Ct. at 97, 81 L.Ed. at 72. Thus, a defendant cannot remove a state law claim from state to federal court event if his defense is based entirely on federal law. See Northeast Dept. ILGWU v. Teamsters Local Union No. 229 Welfare Fund, 764 F.2d 147 (3d Cir. 1985).

Kilmer v. Central Counties Bank, 623 F.Supp. 994, 997 (W.D. Pa. 1985).

In the case at bar, the plaintiff's complaint seemingly presents only a claim for the allegedly defamatory statements made

by defendants at the grievance proceeding between the Union and Bethlehem Steel. However, in his prayer for damages, plaintiff seeks back pay for wages lost. Complaint at ¶26. In addition, plaintiff seeks to challenge the arbitration decision and the actions taken with regard to his employment. Finally, plaintiff states in his complaint that the arbitration proceeding was binding and that the avenue by which he must seek a remedy is through the National Labor Relations Board (NLRB) and the federal court. Complaint at ¶23.

Looking at the complaint alone, a basis for federal question jurisdiction does not appear since

the claim itself does not rely on federal law, but rather state law. However, as recently stated by a legal commentator, "[a]fter Franchise Tax Board, however, where federal law has 'completely preempted' the state law cause of action, it is proper to recharacterize the action as one that actually arises under federal law, despite the plaintiff's usual mastery over his complaint." Comment, Federal Preemption, Removal Jurisdiction and the Well-Pleaded Complaint Rule, 52 U.Chi.L.Rev. 634, 661 (1984)(authored by Richard E. Levy).

Therefore, the court is left with the question of whether federal preemption exists, and if it does,

the court must then determine whether federal law provides a remedy. Kilmer v. Central Counties Bank, 623 F.Supp. 994, 997 (W.D.Pa. 1985).

The united States District Court for the Northern District of Alabama, on facts very similar to the case at bar stated,

> [i]t is an established principle that where the nature of the claim asserted in the complaint is federal, the suit may be removed, irrespective of whether it is so characterized by the plaintiff in his complaint. See 1A Moore's Federal Practice ¶0.160, pp. 185-186 (2d ed. 1982). Here, although the complaint on its fact pleads no cause of action under federal law, plaintiff's deposition clearly elucidates that the complained of

> statements took place during the course of a management-union grievance proceeding. Where a question of federal status may be involved, a federal court may look beyond the complaint to the background of the plaintiff's claim to determine whether federal question jurisdiction exists. See 1A Moore's Federal Practice ¶0.160, p. 186 (2d ed. 1974), and LaChemise Lacoste v. Alligator Company, 313 F.Supp. 915 (D.Del. 1970).

Brooks v. Solomon Co., 542 F.Supp. 1229, 1231 (N.D.Ala. 1982). In that case, plaintiff filed suit in Alabama state court against her employer and an officer of the company for damages as the result of false and malicious statements made during a management-union grievance proceeding. In that case, the court

denied plaintiff's motion to remand.

In Olguin v. Inspiration Consolidated Copper Co., 740 F.2d 1468 (9th Cir. 1984), the Ninth Circuit Court of Appeals held that a tort claim for intentional infliction of emotional distress was properly removed to federal court. In that case the plaintiff did not show that the dispute involved anything other than his employment or work condition. Therefore, the court concluded the claim was governed by federal law to the exclusion of state law and was properly removed. Olguin, 740 F.2d at 1476. Accord, Green v. Hughes Aircraft Co., 630 F.Supp. 423 (S.D. Cal. 1985).

In the instant case, there is no dispute that the alleged defaming statements concern the alleged assault on August 16, 1984. Plaintiff himself states that the alleged defamatory statements occurred in the context of a grievance proceeding held pursuant to the collective bargaining agreement in place between Bethlehem Steel and the Union. Therefore, as in Green, supra, the statements plaintiff challenges are integrally involved with the rights and procedures provided under the collective bargaining agreement.

As a result, removal of this action was proper and plaintiff's claim shall be recharacterized as a claim brought pursuant to ¶301 of

the Labor Management Relations Act.

29 U.S.C. §185.

/s/ Sylvia H. Rambo
Sylvia H. Rambo
United States
District Judge

Dated: May 19, 1987

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 86-1634

MICHAEL KINDNESS,
Plaintiff

v.

DONALD J. SPANG, et al.,
Defendants

ORDER

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

On March 12, 1987, this court ordered defendants for (sic) forward to the court, for an in camera review, the personnel filed (sic) of Donald J. Spang. Robert A. Yohe, and Clarence J. White. After an in camera review of these files, the court identifies nothing contained therein to support any of the

contentions of plaintiff which would warrant turning the files over to plaintiff. The court will return the files to counsel for Bethlehem Steel.

Therefore, IT IS ORDERED THAT plaintiff's request for the personnel files of Donald J. Spang, Robert A. Yohe and Clarence J. White is denied.

/s/ Sylvia H. Rambo
Sylvia H. Rambo
United States
District Judge

Dated: April 7, 1987

IN THE UNITED STATES DISTRICT
COURT FOR THE MIDDLE DISTRICT
OF PENNSYLVANIA

CIVIL ACTION NO. 86-1634

MICHAEL KINDNESS,
Plaintiff

v.

DONALD J. SPANG and
ROBERT A. YOHE,
Defendants

ORDER

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

On March 12, 1987, this court held a discovery conference at the request of the parties where objections to plaintiff's request for documents were stated. As a result, with regard to each item, the court rules as follows:

1. The total grievance record.

Counsel for Bethlehem Steel agreed to produce the grievance proceeding record without admitting the relevance of that record. These documents shall be produced in the afternoon of today, March 12, 1987, at the office of Bethlehem Steel. The cost of reproduction of any or all of these documents shall be borne by plaintiff. Further, it is understood that any attorney work product is not required to be produced.

2. A list of the correct names and the most current addresses of all employees, past and present, with any connection to the above caption.

Bethlehem Steel shall supply the names and addresses of those employees that Bethlehem Steel knows has knowledge of the underlying incident resulting in the arbitration hearing. Plaintiff shall supply to Bethlehem Steel a list of names, in addition to the aforesaid names, that plaintiff wishes to depose, setting forth the relevance of their testimony to this case.

3. The employee records and all papers and material pertaining to Donald J. Spang, Robert A. Yohe, Michael Kindness and Clarence White.

Bethlehem Steel has agreed to supply plaintiff's personnel file to plaintiff. Regarding the personnel files of the remaining named

individuals, Bethlehem Steel shall forward those files to the court for an in camera review. The purpose of this review is to determine as follows:

> a) The White file- to determine whether there are any previous allegations of involvement with assaults.
>
> b) The Yohe and Spang files - to determine whether either Yohe or Spang were involved in any prior encounters with plaintiff in the course of his employment or any prior dismissals for cause with regard to management problems.

4(a) All files, records, documents, notes, and any material pertaining to the false accusations of assault.

At the discovery conference plaintiff stated that the request

refers to certain letters from himself to Bethlehem Steel and Bethlehem Steel's responses to those letters. Plaintiff shall furnish copies or otherwise identify which specific letters he is referring to before production of those documents is required. Further, it is understood that any attorney work product is not required to be produced.

4(b). The proceedings of the Commonwealth of Pennsylvania.

Plaintiff has specified that he is requesting the record from his Unemployment Compensation hearing. Because Bethlehem Steel has agreed to furnish the requested record, this issue is moot.

4(c). The charge before the

National Labor Relations Board.

Bethlehem Steel shall produce all documents attributed to or initiated by defendants Spang and Yohe which were supplied to the National Labor Relations Board.

5. Plant access for the purpose of photographing and recording information about the location pertinent to the captioned case.

Because Bethlehem Steel has agreed to permit the above request, this request is moot.

6. All records and materials (including notes) pertaining to the captioned case.

At the discovery conference plaintiff identified this request as a request for documents pertaining

to conversations of settlement in this case This request is denied.

Regarding the scope of the depositions, the court initially instructed the plaintiff during the conference that the scope of the depositions was limited to issues of defamation. A review of the case law reveals that, in a case where alleged defamation statements are made by the employer about an employee within the context of an investigation involving improper acts and where the statements are central rather than tangential to rights and procedures provided under a collective bargaining agreement, the defamation action would properly be recharacterized as a claim for breach of that collective bargaining

agreement and removal may be proper. Green v. Hughes Aircraft Co., 630 F.Supp. 423, 426, 427 (S.D. Cal. 1985). Therefore, while not deciding the appropriateness of removal, the plaintiff may inquire into issues relative to the breach of the collective bargaining agreement.

In the event that the questions at the deposition go beyond the permissible scope in counsel's opinion, counsel for defendant shall place an objection on the record and advise the client to answer or not answer the question. Plaintiff shall proceed to the next question without argument. In the event plaintiff deems said question pertinent and

within the scope of discovery, he may petition this court to compel the answer to the specific question, which will be ruled on by the court at a later time.

Because of the difficulties the court has experienced in attempting to deal with the issues as they have arisen between the parties, particularly in avoiding possible ex parte communications, any further communication with the court by the parties shall be in writing and either posted to the court or hand delivered to the office of the Clerk of Court.

/s/ Sylvia H. Rambo
Sylvia H. Rambo
United States
District Judge

Dated: March 12, 1987